OHBAYASHI-GUMI LTD.

v.

INDUSTRIAL FIREPROOFING PTE. LTD.

HIGH COURT, SINGAPORE
LP THEAN J
[ORIGINATING MOTION NO. 64 OF 1990]
24 JULY 1991

CONTRACT: *Main contract and sub contract - Tests carried out by agent of employer - Additional work and labour - Whether unreasonable testing - Implied term - Standard of reasonable care and competence - Reasonable diligence, skill and care - Employer's duty under main contract - Meaning of claim "payable" under main contract - Legally sustainable.*

The appellants were appointed main contractors by the employer to carry out and complete the construction of a 52-storey office building. The respondents R who are fire protective coating specialists were by a sub contract employed by the appellants to carry out the supply application and completion of fire protective coating.

Practical completion of the sub contract work was achieved on 8 February 1986; subsequently, however, differences arose between the appellants and R in connection with various claims made by R under the sub contract final account.

These differences were referred for arbitration before a single Judge sitting as the sole arbitrator. R's entire claim was allowed by the learned arbitrator; the appellants applied under s. 28(3)(b) of the Arbitration Act for leave to appeal against certain parts of the award.

Leave was given to apply against that part of the award dealing with an item of the final account which involved an issue known as "Test Exceeding ASTM" which was a test for determining whether the protective spray achieved the required thickness. The tests were carried out by an agent employed by the employer.

It was the contention of R that the tests carried out by the agents exceeded the guidelines of the quality control programme and were unreasonable in amount or detail, as a result R were required by the appellants to respray the areas rejected by the testing agents. R claimed the cost of the material incurred in the application of this additional thickness and labour costs.

The main complaint of the appellants was that there was no legal basis for R to sustain the claim as they had no control over the testing agents and therefore could not be held vicariously responsible for any unreasonable testing adopted by them.

R in turn contended that their claim was founded firstly on an implied term of the sub contract that the sub contract works would not be rejected on the basis of testing that was unreasonable.

Secondly, it was contended that the claim was based on an express term of the sub contract, as it relates to the contractual obligations owed by the contractor to the employer to provide fireproofing spray.

Held:

[1] It is necessary to determine firstly whether the claim of the sub contractor is legally sustainable; only where there is such a claim does the next question arise, that is, whether it is payable under the main contract.

[2] A claim "payable" under the main contract means one which is legally sustainable and, on the facts established, would be likely to succeed if it had been made against the employer by the main contractor. It does not mean a claim found or adjudicated by a Court or an arbitrator to be payable by the employer. Nor does it mean a claim paid by the employer under the subcontract.

[3] There was an implied term that the subcontract works would not be rejected on the basis of unreasonable testing, and such an implied term was both reasonable and necessary to give business efficacy to the sub contract.

[4] The employer was in breach of the main contract in that they had failed to employ a testing agent with qualifications and experience stipulated in the contract and the appellants would have a claim against them for damages for breach of contract of they had made such a claim.

[5] The testing agents were the agents of the employer and there was an implied term that the employer would ensure that the testing agents would carry out their duties as testing agents and there was a further implied term that the testing agents would perform their duties with reasonable diligence, skill and care. As the agents fell short of the reasonable standard of skill and competence, there was breach of the implied term that the testing agents would discharge their duties with reasonable diligence, skill and care.

[Appeal dismissed as claim of the respondents legally sustainable.]

Cases referred to:
Young & Merton Ltd. v. McManus Childs Ltd. [1969] 1 AC 454 ***(foll)***
Perini Corp. v. Commonwealth of Australia [1969] 12 BLR 82 ***(cit)***
London Borough of Morton v. Stanly Hugh Leech Ltd. [1985] 32 BLR 51 ***(cons)***

Legislation referred to:
Arbitration Act [Sing], s. 28(3)(b)
Sale of Goods Act 1893 [UK], s. 14(2)

For the appellants - C S Wu; M/s.. Donaldson & Burkinshaw
For the respondents - Richard Harvery, QC; M/s.. May Oh & Wee

JUDGMENT

LP Thean J:

The appellants are building and civil engineering contractors and on 25 May 1983 were appointed the main contractors by Singapore Treasury Building Pte. Ltd. (the employer) to carry out and complete the construction of a 52-storey office building at Shenton Way, now known as the Treasury Building. The building's design provided for the building to be supported by structural steel works consisting, *inter alia*, of multiple cantilevered primary girders connected to the central lift core to support each of the floors. The contract specifications required all the building structural steel works and metal-decking for the floors to be treated with a spray-on of two-hour rated fire protective coating. The respondents are fire protective coating specialists and by a sub contract dated 12 June 1984 were employed by the appellants to carry out the supply, application and completion of the fire protective coating. The coating material selected for use and application under the subcontract was

"Monokote" fire protection spray. Practical completion of the subcontract work was achieved on 8 February 1986. Differences then arose between the appellants and the respondents in connection with various claims made by the respondents under the subcontract final account. These differences, in accordance with the subcontract, were referred to arbitration before Mr. M Karthigesu sitting as the sole arbitrator. Following the conclusion of the hearing, the learned arbitrator published his award on 28 May 1990.

Soon thereafter, the appellants applied under s. 28(3)(b) of the Arbitration Act for leave to appeal against certain parts of the award, and the application was heard before me. At the conclusion of the hearing, I allowed leave to appeal only against that of the award dealing with item 12 of the final account which involved the issue known as "Test Exceeding ASTM", subject to two conditions, one of which was that the appeal was to be heard before me on the following day. Accordingly, the appeal was heard before me.

The issue arose in this way. The "Monokote" spray carried out by the respondents was subject to testing prescribed by the code of American Society For Testing And Materials No. E605 (which in brief was called "ASTM" testing) for the purpose of determining whether, among other things, the "Monokote" spray achieved the required thickness. ASTM testing was conducted by M/s. Sanberg, who were employed by the employer as the testing agents These testing agents reported to the employer's civil engineers, M/s. Ove Arup & Partners, in relation to their testing work. The respondents contended before the learned arbitrator that the testing agents, M/s. Sanberg, insisted upon carrying out tests which went far beyond the guidelines of an agreed quality control programme and were unreasonable in amount or detail. In consequence, the respondents were required by the appellants to respray areas rejected by M/s. Sanberg. The respondents in order to mitigate the loss which they would otherwise have incurred by having to go over much of their work more than once sprayed an excessive thickness of "Monokote" onto many of the members of the steelwork from the 11th level upwards in order to ensure that their work would pass the unreasonable thickness testing conducted by M/s. Sanberg. The cost of the material incurred in the application of this additional thickness was claim at $449,632, to which was added a sum of $19,200 for labour cost, thereby totalling $468,832.

The entire claim of $468,832 was allowed by the learned arbitrator. It is convenient at this stage to set out the learned arbitrator's deliberation on this claim in some detail, which was as follows:

> I have given my most careful consideration to Mr. Havery's submissions at pp. 24 to 27 and p. 73 of his written submissions and to pp. 67 to 75 of Mr. Wu's written outline submissions. I have re-read the relevant portions of the evidence referred to me by both Counsel. On a balance of probabilities I find that IFP's (the respondents') work for thickness was subjected to extreme and unnecessary testing with the result that in order to avoid being failed and having to respray the failed areas for thickness which were being failed even when they fell marginally short of the required thickness IFP consciously sprayed to extra thickness aiming at an extra thickness of 25%. The evidence does in fact show that on average the excess thickness over the Rolf Jensen thicknesses to be of 6 mm but the claim is limited to an extra thickness of 4 mm only.
>
> The calculation is based on the actual quantity of MK-5 that would be required to spray a thickness of 4 mm over the Rolf Jensen's thicknesses and was explained by Mr. King in his evidence at pp. 1221 to 1224 of the transcript. The calculation itself appears as appendix 2 to the points of claim. Although this calculation is based on an estimate I accept the evidence of Mr. King that the formula he used is recognised formula. Thus was arrived the cost of the MK-5 which was required to spray the excess 4 mm at $449,632.

It was suggested by Mr. Wu that the calculation in appendix 2 also included the cost of material used in rectification work. There is no evidence in support of this contention which was strenuously denied by Mr. King. In addition to the claim for the costs of the MK-5 to spray the extra 4 mm thickness IFP also claim the labour cost. This is claimed at 12 man-month in the sum of $19,200. This claim is justified.

These findings of facts by the learned arbitrator have not been challenged, and I accept them entirely for the purpose of this appeal. The quantum of the claim as flowed by the learned arbitrator was also not challenged or disputed. Nor was it challenged or disputed that the damage or loss as claimed by the respondents and allowed by the learned arbitrator was the direct consequence of "the extreme and unnecessary testing" to which the respondents' works were subjected. The main complaint made on behalf of the appellants was that there was no legal basis for sustaining this claim. On the face of the award this complaint is not entirely without any merit, as it is not apparent from the award the legal basis on which the learned arbitrator allowed the claim. Nor was the legal basis really canvassed before him; at any rate I can find no argument on the point in the written submission made on behalf of the respondents and referred to in the award. Hence, the only issue before me is whether on the facts as found by the learned arbitrator the claim of the respondent is sustainable in law.

It is the contention of Mr. Wu on behalf of the appellants that the respondents have no cause of action in maintaining this claim and the learned arbitrator erred in allowing it. This is so even if the testing method adopted by the testing agents exceeded the ASTM requirement; such action of the testing agents could not constitute a breach of the subcontract by the appellants. The testing agents were appointed by the employer; they reported to the employer's consulting engineers, and the appellants had no control over them and therefore could not be held vicariously responsible for any unreasonable testing adopted by them. If the respondents wished to pursue their claim on this issue their proper recourse was to arrange with the appellants to initiate arbitration in the name of the appellants against the employer in what Mr. Wu called a name-borrowing arbitration.

In response, Mr. Havery on behalf of the respondents submitted that the respondents' claim was founded, first, on an implied term of the subcontract and, second, on an express term thereof. In his submission, in order to give business efficacy to the subcontract, there was an implied term that the subcontract works would not be rejected on the basis of testing that was unreasonable in amount or detail. In this connection, the learned arbitrator had already found that the subcontract works for thickness were subject to extreme and unnecessary testing and such testing was therefore unreasonable in the circumstances. That constituted a breach of the implied term giving rise to a claim in damages. As for the claim founded on an express term, Mr. Havery relied on Clause 27 of the subcontract.

I propose to consider, first, the claim of the respondents founded on Clause 27 of the subcontract. Clause 27 provides:

27. Claims

Claims by the sub contractor against the contractor for work done under the sub contract or for other benefits under the sub contract which relate to contractual obligations owing by the contractor to the employer are only payable if the same are payable by the employer under the main contract.

The contractor and the subcontractor shall render each other all necessary assistance in making claims against the employer arising from the sub contract works.

It was submitted by Mr. Havery that this claim fell within this clause: it was "a claim by the subcontractor against the contractor for work done under the subcontract", that is, spraying of extra thickness in order to comply with M/s. Sanberg's extreme and unnecessary testing; it "relates to the contractual obligations owing by the contractor to the employer" because the contractor was bound to provide fire-proofing spray which was the subject of the subcontract, and it is payable by the employer under the main contract. Such a construction as contended by Mr. Havery assumes that the claim of the respondents is "payable" under the subcontract and fails to have sufficient regard to the word "payable". That plainly is not correct. For this clause to apply the subcontractor must have a claim "payable" under the subcontract, that is, a claim sustainable in law under the subcontract. Therefore, it is necessary to determine first whether the claim of the subcontractor is legally sustainable, and it is only where there is such a claim that the next question arises, namely: whether it is "payable' under the main contract. Clause 27, in my opinion, on a plain reading, does not give to the respondents a cause of action which they otherwise do not have. On the contrary, that clause restricts the right of recovery of the respondents under the subcontract. It expressly says that the claims of the respondents against the appellants are "only payable if the same are payable by the employer under the main contract." I shall have occasion shortly to consider this aspect of Clause 27. For the moment, I express my entire agreement with Mr. Wu that Clause 27, on the true construction, cannot found a claim against the appellants, which is not legally sustainable.

I now turn to the claim of the respondents founded on the implied term as contended by Mr. Havery. To determine whether such a term can be implied it is necessary to consider the relevant provisions of the subcontract and also the main contract. Under Clause 1 of the subcontract the respondents were deemed to have "notice of all the provisions of the main contract except the detailed prices" of the appellants included therein. Under Clause 2 the respondents were to execute and complete the subcontract works subject to and in accordance with the subcontract in all respects to the reasonable satisfaction of "the contractor and of the Architect" and in conformity with, *inter alia*, "all reasonable rules of the contractor (the appellants) (so far as they may apply) for the time being regulating the due carrying out of the main contract Works". Clause 5 of the subcontract incorporated the provisions of the main contract and, so far as relevant, is as follows:

> 5. The sub contractor, his successors and permitted assigns shall:
>
> (a) observe, perform and comply with all the provisions of the main contract on the part of the contractor to be observed, performed and complied with in so far as they relate and apply to the sub contract works (or any portion of the same) and are not repugnant to or inconsistent with the express provisions of this subcontract, as if the same were severally set out herein;
>
> (c) indemnify the contractor against all loss and expense arising from:
>
> i. any breach, non-observance or non-performance by the sub contractor, his servants or agents of any of the said provisions of the main contract;
>
> ii. any act or omission of the sub contractor, his servants or agents which involves the contractor in liability to the employer under the main contract;
>
> **Provided** that nothing in this sub contract shall be construed to impose any liability on the sub contractor by reason of the negligence or breach of duty on the part of the employer, the contractor, his other sub contractors or their respective servants or agents, or create a privity of contract between the sub contractor and the employer or any other sub contractor."

a The provisions in the subcontract relating to testing are found in Clause 7, which, in so far as relevant, provides as follows:

7. Inspection and Tests

All materials and workmanship shall be subject to inspection, examination and testing by the employer, an independent testing agency employed by the employer or the contractor at any time during manufacture installation and/or construction and at any place where *b* the materials are manufactured installed or constructed.

Further provisions relating to testing of "Monokote" spray are found in Clause 13 of the specifications to the subcontract and are in the following terms:

13. Testing Sprayed Fireproofing

c The independent testing agency employed by the employer will carry out the inspections and tests but not limited to the following. And the sub contractor shall furnish promptly and without charge all reasonable on-site facilities, labour and materials necessary for the carrying out of such inspections and tests.

(c) Inspect and test for thickness at minimum of 4 locations on beams and columns for each 250 square meter of building area.

d (e) Inspect and test for bond strength one for each 1,000 square meter of building area.

(f) Inspection and test procedures in accordance with ASTM E605.

In addition, there was a quality control and quality assurance programme agreed to between the appellants and the respondents, which was made after subcontract was entered into, and which provided, *inter alia*, for 4 test locations on beams and 4 test locations on floors *e* in an area not to exceed 200 square metres. In the foreward to this programme, it was stated that the document was not intended to be in any way binding on the consultants who may direct "additional test to be carried out as, when and where they considered necessary". In the introduction to this document it was stated that by adoption of the provisions of testing contained therein, which were expressed to be principal guidelines, the specified contractual and technical requirements for the materials would be shown to be achieved.

f I now turn to the main contract. The relevant provision thereof provided that there should be, as a minimum, an on-site manager of the independent testing laboratory who should be a graduate and had certain professional qualifications. It was further provided that, as a minimum, independent testing laboratory on-site supervisory personnel should have, among other things, a qualification in metrology. These provisions are contained in the appendix to structural steelwork and metal decking of the main contract and are as follows:

g

Testing Laboratory Services

Part 1 - General

1.03 Qualifications of Laboratory

E. As a minimum, the on-site manager of the Independent Testing Laboratory shall:

h 1. Be a graduate of an accredited college or university with a degree in civil engineering.

2. Be a registered professional engineer.

3. Have prior experience in the immediate project area.

4. Have a minimum of 15 years experience in a managerial or supervisory capacity of testing laboratories in direct connection with quality control and design of major engineered *i* structures.

F. As a minimum, Independent Testing Laboratory on-site supervisory personnel shall:

1. Be a graduate of an accredited high school; have a minimum of 5 years documented experience in a supervisory capacity in laboratory testing.

2. Be qualified and certified in the fields of testing required for project, as well as metrology, as set forth in appropriate quality assurance and calibration manuals.

The parties to the main contract therefore expressly stipulated that a properly qualified inspection team would be provided to carry out the tests.

M/s. Sanberg were engaged by the employer as the testing agents and they had as their representative on site one Denis Bower who reported directly to the project consulting engineer on his duties. It is common ground that Denis Bower did not have the qualifications and experience specified in the main contract. He had no qualification in metrology and did not appear to have sufficient experience and knowledge of the subject. He had been trained for only half a day. As between the appellants and the employer, there was clearly a breach of the terms of the main contract by the employer.

In the context of these provisions of the contracts, the question is what terms can reasonably and necessarily be implied to give business efficacy to the subcontract. I approach this question, first, by taking a broad view of the main contract. That contract was entered into by the employer and the appellants to accomplish one objective the successful construction and completion of the Treasury Building. Below and subsidiary to this contract were multiple subcontracts contemplated by the parties as necessary for the purpose of achieving that objective; and one of such subcontracts was that between the appellants and the respondents. This subcontract must have been entered into with the approval or consent of the employer; but whether the employer had knowledge of the terms of such subcontract is unclear. I would assume that the employer would generally be aware of the terms thereof. Next, I turn to the subcontract. I think it cannot be disputed that the respondents entered into the subcontract with full knowledge - at any rate, they were deemed to have knowledge - of the relevant provisions of the main contract and in particular those pertaining to testing of the "Monokote" spray by the testing agents and the requisite qualifications and experience of the testing agents. Both the appellants and the respondents must have entered into the subcontract on the assumption that the provisions of the main contract which were to be performed by the employer and the appellants would be observed and performed by them respectively. Clause 27 of the subcontract provides that the appellants and the respondents "shall render each other all necessary assistance in making claims against the employer arising from the subcontract". Implicit in this express obligation is an obligation on the part of the appellants to do and carry out all cooperative acts and things necessary to give effect to that provision which, in my opinion, would include requiring the employer to observe and perform its obligations under the main contract. Hence, it must have been within the contemplation of the appellants and the respondents that those provisions of the main contract which pertain or affect the performance by the respondents of the subcontract and which were on the part of the employer to be observed and performed, the respondents would look to the appellants to ensure that they would be observed and performed by the employer. In these circumstances, there must be implied a term that the appellants as the main contractor would ensure that these provisions of the main contract would be observed and performed by the employer, and that the employer's servants or agents in discharging the duties assigned to them under these contracts would discharge their duties with reasonable diligence and with reasonable skill and care and would not act unreasonably with respect to the subcontract works carried out by the respondents, and that where the duties involve the testing of the subcontract works these servants or agents would not subject the works to

unreasonable testing. It follows therefore, in my judgment, that there was in this case, as contended by Mr. Havery, an implied term that the subcontract works would not be rejected on the basis of testing that was unreasonable in amount or detail. Such an implied term is, in my opinion, both reasonable and necessary so as to give business efficacy to the subcontract.

In this connection, I find of assistance the case of *Young & Merton Ltd. v. McMansus Childs Ltd.* [1969] 1 AC 454 relied upon by Mr. Havery in support of his argument, In that case, the subcontractors agreed to roof certain houses for the builders and obtained the necessary tiles for the purpose in the ordinary course of trade and fixed them. The tiles were in fact specified by the builders. Owing to faulty manufacture the particular tiles were defective, It was held by the House of Lords that the implied warranty of quality of the tiles was not excluded. Lord Reid said, at pp. 465-466:

> This is a contract for the supply of work and materials and this case raises a general question as to the nature and extent of the warranties which the law implies in such a contract. As regards the contractor's liability for the work done there is no dispute in this case: admittedly it must be done with all proper skill and care. The question at issue relates to his liability in respect of material supplied by him under the contract. The appellants maintain that the warranty in respect of materials is similar to that in respect of work, so that, if the selection of material and of the person to supply it is left to the contractor, he must exercise due skill and care in choosing the material and the person to supply it. But where, as in this case, the material and the supplier were chosen by the respondents, the appellants maintain that there was no warranty as to the fitness or quality of the tiles. The respondents admit that, if it is held that the choice of this type of tile was theirs and theirs alone, there can be no implied warranty that this type of tile was fit for the contract purpose. But they say that there still was a warranty that the tiles would be of good quality and that warranty must be implied, notwithstanding the fact that they left no choice to the appellants in selecting the person who was to supply the tiles.
>
> I take first the general question of the contractor's liability where the material which he is required to use can be obtained from any one of several suppliers and the choice of suppliers is left to him. There is no doubt that in every case he is bound to make a proper inspection of the material before using it, and he will be liable if the loss is caused by the use of material which reasonable inspection would have shown to be defective. The question is whether he warrants the material against latent defects.
>
> There are, in my view, good reasons for implying such a warranty if it is not excluded by the terms of the contract. If the contractor's employer suffers loss by reason of the emergence of the latent defect, he will generally have no redress if he cannot recover damages from the contractor. But, if he can recover damages, the contractor will generally not have to bear the loss: he will have bought the defective material from a seller who will be liable under s. 14(2) of the Sale of Goods Act 1893, because the material was not of merchantable quality. And, if that seller had in turn bought from someone else, there will again be liability, so that there will be a chain of liability from the employer who suffers the damage back to the author of the defect.

Similarly in this case there are good reasons for implying the term in the subcontract. If such a term is not implied, the subcontractors would be left with no redress. The respondents were the subcontractors and they suffered loss by reason of the incompetence of the testing agents and the unreasonable nature of the testing conducted by such agents; the agents were employed by the employer. The respondents would have no redress if they cannot recover damages from the appellants. But, if the respondents can recover damages from the appellants, the latter would not have to bear the loss, as they would have recourse against the employer.

At this juncture, it is relevant to revert, once again, to Clause 27 of the subcontract, because Clause 27 restricts the respondents' right of recovery under the subcontract. That clause provides that a claim by the respondent for work done under the subcontract or for other benefits under the subcontract which relate to contractual obligation owing by the appellant to the employer is "only payable if the same (is) payable by the employer under the main contract". I have held that the respondents have a sustainable claim against the appellants, that is, a claim "payable" under the subcontract on the basis of an implied term. The next question is whether a similar claim, if made by the appellants against the employer, is "payable" under the main contract. In my opinion, a claim "payable" under the main contract means one which is legally sustainable and, on the facts established, would be likely to succeed if it had been made against the employer by the main contractor. It does not mean a claim found or adjudicated by a Court or an arbitrator to be payable by the employer. Nor does it mean a claim paid by the employer under the subcontract.

I have already referred in some detail to the provisions of the main contract stipulating the required qualifications and experience of the testing agents to 'be employed by the employer. On the undisputed facts before the learned arbitrator, the testing agents' representative, Denis Bower, did not have the qualifications and experience under the contract. It follows that the employer was in breach of the main contract in that they had failed to employ a testing agent with the qualifications and experience stipulated in the contract, and the appellants would have a claim against them for damages for breach of contract if they had made it.

The testing agents, M/s. Sanberg, were employed by the employer to conduct the testing. They were agents of the employer. There was an implied term that the employer would ensure that the testing agents would carry out their duties as testing agents: *Perini Corp. v. Commonwealth of Australia* [1969] 12 BLR 82. There was a further implied term that the testing agents would perform their duties with reasonable diligence, skill and care: *London Borough of Merton v. Stanly Hugh Leech Ltd.* [1985] 32 BLR 51.

In *Perini Corp.* the plaintiffs under a building contract agreed to carry out certain construction for the Commonwealth of Australia, and one of their complaints was that the director of works who was in the employ of the Commonwealth failed to exercise his duty as a certifier in granting the extension of time under the contract. Macfarlen J held, *inter alia*, that there was an implied term in the building contract that the director of works would perform his duties under the contract.

More relevant to the instant case is *London Borough of Merton*. There, the contractors complained that the delay in completing the works was wholly due to the want of diligence and care and lack of cooperation of the architect of the employer. Vinelott J held that there was an implied term in the building contract made between the employer and the contractor that the architect would perform his duties under the building contract with reasonable diligence and with reasonable and care. The learned Judge said, at p. 78:

> It is to my mind clear that under the standard conditions the architect acts as the servant or agent of the building owner in supplying the contractor with the necessary drawings, instructions, levels and the like and in supervising the progress of the work and in ensuring that it is properly carried out. He will of course normally though not invariably have been responsible for the design of the work.
>
> To the extent that the architect performs these duties the *building owner contracts with the contractor that the architect will perform them with reasonable diligence and with reasonable skill and care.* The contract also confers on the architect discretionary powers which he must exercise with due regard to the interests of the contractor and the building owner. The building

owner does not undertake that the architect will exercise his discretionary powers reasonably; he undertakes that although the architect may be engaged or employed by him he will leave him free to exercise his discretion fairly and without improper interference by him. (Emphasis is mine)

On the question of the architect's duty to provide information concerning the works, the arbitrator found that there was an implied term that the architect would provide the contractor full, correct and coordinated information concerning the work. The learned Judge said, at p. 82:

I have found this point one of some difficulty but I am not persuaded that the arbitrator was wrong to imply this term. Clause 3(4) imposes on the architect an obligation to furnish the contractor with drawings and details as and when necessary. I agree with the arbitrator that it must, have been in the contemplation of the parties that the architect *would act with reasonable diligence and would use reasonable care and skill in providing this information.* (Emphasis is mine)

The learned Judge was also in agreement with the finding of the arbitrator that there was an implied term that the architect would administer the contract in an efficient and proper manner and in accordance with the practice and procedure normally followed by architects administering substantial building contract. He said at pp. 83-84:

The first part of this implied term (that the architect would administer the contract in an efficient and proper manner) seems to me no more than a re statement or particular application of *Merton's* contractual undertaking that there would at all times be a person answering the definition of "the Architect" in Clause 3 of the articles of agreement and that *the architect would be a reasonably competent person and would use that degree of diligence skill and care in carrying out the duties assigned to him under the contract that could reasonably be expected of an architect appointed to that position.* As the arbitrator observed, it is clearly impossible to define accurately and comprehensively the various acts of an architect which together make up efficient and proper administration". (Emphasis is mine)

Reverting to the instant case, the learned arbitrator found that the subcontract works for thickness had been subjected to extreme and unnecessary testing; by necessary implication, the learned arbitrator found that the testing conducted by the testing agents fell short of the reasonable standard of skill and competence. That was, therefore, a breach of the implied term that the testing agents would discharge their duties with reasonable diligence, skill and care. The appellants would have a sustainable claim against the employer founded on a breach of the express terms as well as a breach 'on the implied term of the main contract, had they wished to make it; they have a claim "payable" under the main contract. By suggesting that the respondents should have made arrangement with the appellants to have name borrowing arbitration, the appellants by implication recognises the existence of such a claim. Hence, the requirements of Clause 27 of the subcontract have been satisfied.

In the result, the claim of the respondents, in my judgment, is legally sustainable and the appellants' appeal must fail and is dismissed. I now wish to hear arguments on the question of costs.

Also found at [1991] 3 CLJ 2330